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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 05.04.2022

\+ ARB.P. 1147/2021 & I.A. 4687/2022

IIFL FINANCE LIMITED ..... petitioner

versus

MR VINAY JAIN ..... Respondent

AND

\+ ARB.P. 1170/2021

IIFL FINANCE LIMITED ..... Petitioner

versus

BEST VIEW PROPERTIES LIMITED ..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. Amit Singh Chadha, Senior Advocate with Mr. Suresh Dutt Doblal, Mr. Shikhar Kumar and Mr. Nirmal Goenka, Advocates.

For the Respondent: Mr. Rajat Wadhwa, Mr. Ambhuj Tiwari, Mr. Himanshu Nailwal, Mr. Aditya Varun and Mr. Lakshay Luthra, Advocates.

CORAM:-
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. In Arbitration petition 1147/2021, petitioner seeks appointment of Arbitral Tribunal pursuant to a Credit Facility Agreement dated 01.11.2017 and in Arbitration petition 1170/2021, petitioner seeks appointment of Arbitral Tribunal pursuant to the Deed of Guarantee dated 01.11.2017.

2. Both the documents are alleged to have signed by Mr. Vinay Jain, respondent in Arbitration petition 1147/2021 and the director of the respondent in Arbitration petition 1170/2021.

3. As per the there was a loan transaction between AVJ Developers India Private Ltd. which had availed of three term loans of Rs. 25 crores on 09.01.2015, Rs. 75 crores on 13.01.2015 and Rs. 35 crores on 29.04.2016 respectively. In respect of the said term loan of Rs.35 crores, it is alleged that only Rs.23 crores were disbursed. The total amount disbursed as per the petitioner to the said debtor, AVJ Developers India Private Ltd. was Rs.123 crores. The three loans had become irregular in the month of August, 2017.

4. As per the petitioner, as the management of the said borrower wanted to regularize the three loan accounts, petitioners were approached by the Directors of AVJ Developers India Private Limited, Smt. Asha Jain and Smt. Sakshi Aggarwal. Smt. Asha Jain is the wife of Mr. Vinay Jain and Smt. Sakshi Aggarwal is the wife of Mr. Vipin Aggarwal.

5. They are alleged to have approached the petitioner for sanction of new credit facility in favour of Mr. Vinay Jain so that adjustment could be made to avoid the three loan accounts becoming irregular.

6. As per the petitioner, petitioner sanctioned the loan on 28.09.2017 in the sum of Rs. 85 crores in favour of Mr. Vijay Jain backed by the guarantee of the M/s. AVJ Developers India Private Ltd. and M/s Best View Properties Ltd.

7. As per the petitioner, the said loan amount of Rs. 85 crores was disbursed to the escrow account of AVJ Developers India Private Ltd. Out of the said amount, for the purposes of regularising the three accounts, AVJ Developers India Private Ltd. deposited various amounts to the three term loan accounts which were then regularised and the liability of the three existing loan accounts with the petitioner were reduced.

8. It is further contended that for the three loans they had mortgaged a property at AVJ Heights in Greater Noida as also a property in Community Centre, Anand Vihar, Delhi.

9. It is contended that the property at Anand Vihar was sold and the said amount of Rs. 85 crores and the sale proceeds of Anand Vihar property were first appropriated towards the three loan accounts and the balance surplus left after the sale of Anand Vihar property was adjusted towards the subject loan amount of Rs.85 crores.

10. It is contended since the disputes have arisen, the petitioners have invoked arbitration under the respective agreements referred to hereinabove.

11. Objections have been filed only by Mr. Vinay Jain in Arbitration petition No.1147/2021. No objections have been filed to the Arbitration Petition No. 1170/2021.

12. Learned counsel appearing for Mr. Vipin Jain submits that since the grounds being raised are legal, no separate objections have been filed and the objections filed in Arbitration petition No.1147/2021 be read as objections to the Arbitration Petition No.1170/2021.

13. Respondents have objected to the appointment of the Arbitral Tribunal contending that the agreements are vitiated by fraud for the reason that Mr. Vinay Jain who is alleged to have signed the agreements was in judicial custody from 03.03.2017 to 24.10.2017.

14. Learned counsel for the respondent contends that as per the petitioners the sanction of the loan of Rs.85 crores was done on 28.09.2017 and the disbursement has been done on 04.10.2017 when Mr. Vinay Jain was in judicial custody and as such he could not have signed any document. It is submitted that no financial institution would sanction any loan without any document being signed. It is further contended that the alleged agreements dated 01.11.20217

could not have been signed by him because he was in custody.

15. Further, it is contended by learned counsel for the respondent that the amount of Rs.85 crores, which is alleged to have been disbursed to Mr. Vinay Jain was disbursed to an escrow account and the amount has been taken back by the petitioners themselves and as such a fraud have been played and as the respondent has raised a plea of fraud, the disputes cannot be referred to an Arbitral Tribunal and petitioner should be relegated to file a civil suit for recovery of its alleged dues.

16. Learned counsel for the respondent relies on certain account statements alleged to have been filed by the petitioner in proceedings before the Debt Recovery Tribunal to contend that the amount alleged to have been disbursed on 04.10.2017 was actually adjusted on 30.09.2017.

17. Learned counsel further submits that the Board resolution of AVJ Developers India Private Ltd. dated 01.11.2017 is alleged to have been signed by Mr. Vipin Aggarwal who was in custody on the said date.

18. Further, it is contended that in 2016, Mr. Vinay Jain had himself requested the petitioners to restructure the loan however they had refused to do so and thus there was no occasion to thereafter disburse the amount in 2017 particularly Mr. Vinay Jain was in

judicial custody.

19. Petitioner has filed these petitions alleging that there is an arbitration agreement between the parties contained in the Credit Facility Agreement dated 01.11.2017 and the Deed of Guarantee dated 01.11.2017 which are both signed by Mr. Vinay Jain.

20. Both the agreement are dated 01.11.2017 and as per the respondent, Mr. Vinay Jain was released from custody on 24.10.2017 and as such the submission that he could not have signed the document on 01.11.2017 on the ground that he was in custody is clearly not acceptable. Admittedly, he was not in custody on 01.11.2017 when the two documents are alleged to have been signed by him.

21. Further repeatedly, learned counsel for the respondent was queried as to whether Mr. Vinay Jain admits his signatures on the said documents or disputes the same.

22. Initially there was an outright admission that both the documents were signed by him. Subsequently, during the arguments, an effort was made to resile from the same. However, it is still not contended that the documents do not bear his signatures but it is contended that *they may bear his signatures* or *could have been antedated* or *could have been post dated*.

23. Various conflicting submissions were raised which do not find favour with the Court. None of the submissions could be substantiated by any material on record.

24. It was then contended by learned counsel for the Respondent that the signatures have been denied in a complaint made to the police based on which FIR No.143/2019; Police Station: Economic Offences Wing, has been registered.

25. Learned counsel for the respondent submitted that since there is a reference to the FIR in the objections filed to the appointment of Arbitral Tribunal, the denial in the FIR would amount to a denial of the signatures.

26. Even though, there is no merit in the said submission that a reference to a document allegedly containing a denial would amount to a positive averment of denial before the court that the documents are not signed by Mr. Vinay Jain, however, the contents of the FIR itself were considered.

27. It is observed that even in the complaint which is extracted in the said FIR, there isn't any specific averment that the documents dated 01.11.2017 have not been signed by Mr. Vinay Jain.

28. No material has been produced before this Court to show that there has ever been any denial by Mr. Vinay Jain of his signatures on

the agreements dated 01.11.2017 both of which contain the subject an arbitration agreement.

29. Though, in the FIR there is a reference that various blank documents were got signed however it is observed that in the FIR there are separate paragraphs devoted to specific documents. There is separate paragraph with regard to the agreements dated 01.11.2017 enlisting the grounds on which as per the respondent said document is a forgery. In the said paragraph pertaining to the documents dated 01.11.2017, there is no averment that the document does not bear the signatures of Mr. Vinay Jain.

30. It has been brought on record by learned senior counsel for the petitioner that the original borrower M/s AVJ Developers India Pvt. Ltd. and the respondent M/s Best View Properties Ltd had filed an application before the Debt Recovery Tribunal, under Section 17 of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, impugning the action of the petitioner in disposing of the property at Anand Vihar.

31. It is contended that in those proceedings also there was averment that the agreements dated 01.11.2017 had not been signed by Mr. Vinay Jain.

32. Order dated 09.01.2020 of the Debt Recovery Tribunal shows that the Tribunal has returned a finding that loan facility was availed

of by the said companies and the properties mortgaged.

33. It is the case of the Petitioner that the three loans advanced to M/s. AVJ Developers India Pvt. Ltd. were becoming non performing assets and consequently the Directors of the said company approached the petitioner for grant of a loan in favour of Mr. Vinay Jain so that the said accounts do not become non performing assets.

34. It is the case of the Petitioner that the amount which was deposited in the escrow account on 04.10.2017, was adjusted only after the requisite documentation was signed by Mr. Vinay Jain on 01.11.2017.

35. As per the Petitioner, the contention that the amount was deposited in the escrow account and then withdrawn by the petitioner itself, is contrary to the record for the reason that the amount was first deposited in the escrow account and then adjusted towards the three loan accounts.

36. As per the Petitioners, a non performing asset is considered as of the closing of the quarter and as such the entries were recorded in the accounts as of 30.09.2017 to avoid the accounts from becoming non performing assets.

37. It is pointed out on behalf of the Petitioner that respondents had filed an appeal against the order of the Debt Recovery Tribunal, but

by order dated 29.07.2021 the Debt Recovery Appellate Tribunal has dismissed the appeal in default.

38. Though the contention of learned counsel for the respondent is that a restoration application has been filed, it is not in dispute that the order of the Debt Recovery Tribunal has neither been stayed nor set aside by any Court till date.

39. The Debt Recovery Tribunal in its order dated 09.01.2020 has categorically returned a finding that the documents clearly establish the factum of the loan and the creation of mortgages.

40. It is also observed that proceedings were initiated by the petitioner before the National Company Law Tribunal (NCLT) and the NCLT in its order dated 20.05.2021 has clearly held that the credit facility of Rs.85 crores was sanctioned in favour of Mr. Vinay Jain so as to be adjusted towards the three term loans granted in favour of AVJ Developers India Pvt. Ltd. as the said accounts were becoming non performing assets.

41. NCLT has also noticed that the amount was disbursed to the escrow account of AVJ Developers India Pvt. Ltd. maintained with HDFC Bank and out of the loan amount of Rs.85 crores, various amounts were used for discharging the liability of the three loan accounts of AVJ Developers India Pvt. Ltd.

42. NCLT has noticed that the petitioner had produced before the NCLT, copies of transfer of funds from the account of the petitioner to the escrow account and then the money being transferred to the loan accounts of the corporate debtor to prove the adjustment of the subject loan amount of Rs.85 crores in favour of Mr. Vinay Jain against the three loan accounts of AVJ Developers India Pvt. Ltd.

43. NCLT has also noticed that the amount of Rs.85 crores was transferred by way of an online transfer through RTGS from the petitioner to the account of AVJ Developers India Pvt. Ltd. and on payment of the said amount of Rs.85 crores, the liability of AVJ Developers India Pvt. Ltd. had been duly reduced in respect of the three term loan accounts. NCLT has also held that since Mr. Vinay Jain was released on bail on 24.10.2017 the documents executed by Mr. Vinay Jain on 01.11.2017 could not be ignored on the ground that he was in judicial custody upto 24.10.2017.

44. As noticed hereinabove, there is no denial to the signing of the Credit Facility Agreement and the Deed of Guarantee dated 01.11.2017 by Mr. Vinay Jain; both of which contain a clause for reference of disputes to the Arbitral Tribunal.

45. Further contention of learned counsel for the respondent that the Resolution of the Board of Directors of AVJ Developers India Pvt. Ltd., which is alleged to have been signed by Mr. Vipin Aggarwal on

01.11.2017 could not have been signed by him for the reason that he was in judicial custody till 07.11.2017, also does not have any merit.

46. The certificate signed by Mr. Vipin Aggarwal containing the resolution of Board of Directors relied on by the petitioners, is not dated 01.11.2017. The certificate issued by Mr. Vipin Aggarwal certifies the extract of a resolution passed in a Board of Directors meeting held on 01.11.2017.

47. There is no date on the said certificate either on top or below the signatures of Mr. Vipin Aggarwal, which could show the date on which the certificate was created or signed by Mr. Vipin Aggarwal. The undated certificate merely certifies a resolution passed in a meeting of Board of Directors held on 01.11.2017. The certificate could have been signed after 07.11.2017, when Mr. Vipin Aggarwal was released from judicial custody.

48. Further, there is no denial by the respondent that the certificate extracting the resolution of the board of directors is not signed by Mr. Vipin Aggarwal. The endeavour has been to show that he could not have signed it because he was in judicial custody till 07.11.2017.

49. The certificate is a document which emanates from the respondent and has been handed over to the petitioner. Thus petitioner cannot be faulted for having relied on the said document which is supplied to them bearing signatures of Mr. Vipin Aggarwal.

50. Reference at this juncture may also be had to an order of the Division Bench of this Court dated 25.03.2020 in W.P.(Crl) 2383/2021 titled *Sh. Ankur Gupta vs. The Union of India & Ors*.

51. Said petition was a Public Interest Litigation filed challenging the manner in which the loans were disbursed to the borrowers i.e. the Respondents and it sought investigation into the said transactions.

52. The Division Bench has noticed in its order that though the petition was styled as a Public Interest Litigation, the counsel while arguing the petition questioned the manner in which the mortgaged asset at Anand Vihar was sold under the SARFAESI Act.

53. The Division Bench has observed that the said petition was a motivated exercise undertaken by the petitioner therein (*Sh. Ankur Gupta*) at the behest of the borrowers i.e. the respondents herein, after they had failed to obstruct the sale of the property.

54. The Division Bench has categorically held that it appeared that the petitioner therein (*Sh. Ankur Gupta*) had been set up by the borrowers. Said petition was dismissed with costs quantified at Rs. one lakh.

55. It is pointed out by learned senior counsel for the petitioner that a civil suit was also filed in respect of the Anand Vihar property without impleading the petitioners and without disclosing any of the

transactions between the parties and an interim order was obtained in the said suit, which order was assailed by the Petitioners herein before this Court by way of a petition under Article 227 of the Constitution of India being *CM(M) 109/2020 and CM(M) 110/2020* wherein this Court has been pleased to stay the proceedings in the suit.

56. There is merit in the submission of learned senior counsel for the Petitioner that respondents attempted to adopt all methods to delay and protract litigation. Before this Court also an attempt has been made to delay the proceedings. Even though the signatures on the arbitration agreements are not denied, attempt has been made to vehemently argue the petitions and raise all kinds of contradictory and evasive pleas. Clearly with an attempt to defeat the rights of the petitioner to seek invocation of the arbitration agreement.

57. Despite the fact that the pleas of incarceration, provision of loan facility and signing of documents and FIR were taken earlier before DRT, NCLT; unsuccessfully.

58. The arbitration agreement between the parties contained in the Credit Facility Agreement and the Deed of Guarantee signed by Mr. Vinay Jain needs to be acted upon and an Arbitral Tribunal duly constituted.

59. The submission of learned counsel for the respondent of fraud is also not substantiated from the records of the case as noticed

hereinabove. Clearly efforts are being made by the Respondents to delay the initiation of the proceedings for recovery of its dues by the Petitioners.

60. The judgments relied on by learned counsel for the respondent in support of his contention i.e. *M/s. N.N. Global Mercantile Pvt. Ltd. vs. M/s. Indo Unique Flame Ltd and Ors*. (2021) 4 SCC 379 and *Avitel Post Studioz Limited & Ors vs. HSBC Pl Holdings (Mauritius)* Limited, (2021) 4 SCC 713 to contend that in case of fraud parties should be relegated to a civil suit and not an arbitral tribunal as fraud is beyond the scope of an arbitral tribunal do not support the case of the respondent. The judgments hold to the contrary.

61. In *N.N.Global Mercantile Pvt. Ltd. (Supra)* the Supreme court has held that *"the civil aspect of fraud is considered to be arbitrable in contemporary arbitration jurisprudence, with the only exception being where the allegation is that the arbitration agreement itself is vitiated by fraud or fraudulent inducement, or the fraud goes to the validity of the underlying contract, and impeaches the arbitration clause itself."*

62. The Supreme Court has further held as under:-

> *"50. The ground on which fraud was held to be non-arbitrable earlier was that it would entail voluminous and extensive evidence, and would be too complicated to be decided in arbitration. In contemporary arbitration*

practice, Arbitral Tribunals are required to traverse through volumes of material in various kinds of disputes such as oil, natural gas, construction industry, etc. <u>The ground that allegations of fraud are not arbitrable is a wholly archaic view, which has become obsolete, and deserves to be discarded.</u> However, the criminal aspect of fraud, forgery, or fabrication, which would be visited with penal consequences and criminal sanctions can be adjudicated only by a court of law, since it may result in a conviction, which is in the realm of public law.

51. In the present case, the allegations of fraud with respect to the invocation of the bank guarantee are arbitrable, since it arises out of disputes between parties inter se, and is not in the realm of public law."

(underlining supplied)

63. The Supreme Court in *N.N.Global Mercantile Pvt. Ltd. (Supra)* has categorically held that the ground that allegation of fraud are not arbitrable is a wholly archaic view and deserves to be discarded.

64. In the present case also the allegation of fraud as noticed hereinabove, though raised by the respondent, is not sustainable in view of the factual narration with regard to the petitioner having been approached by the respective wives of Mr. Vinay Jain and Mr. Vipin Aggarwal in an attempt to prevent the loan accounts of AVJ Developers India Pvt. Ltd. from becoming non performing assets and also particularly in view of the fact that there is a banking transaction to show disbursal of the loan of Rs.85 crores which has got adjusted towards the then existing three loan accounts of AVJ Developers India

Pvt. Ltd. and further from the fact that the agreements are admittedly signed by Mr. Vinay Jain.

65. The judgment in *Avitel Post Studioz Limited (Supra)* of the Supreme Court also does not support the case of the respondent.

66. The Supreme Court in *Avitel Post Studioz Limited (Supra)* has held that serious allegations of fraud arise only if either of the two tests laid down by the Supreme court are satisfied and not otherwise.

67. The first test laid down by the Supreme Court is satisfied only when it can be said that the arbitration clause or the agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged, could not be said to have entered into the agreement relating to arbitration at all.

68. The second test is said to be met in case allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or malafide conduct. Clearly the case of the respondent does not fall in the second category.

69. Attempt was made by the respondent to bring his case in the first category by alleging that Mr. Vinay Jain was in custody and as such could not have signed the agreement.

70. In the zeal to make that submission, respondent forgot that Mr. Vinay Jain had been released from custody on 24.10.2017 and the

agreement is dated 01.11.2017, on which date Mr. Vinay Jain was not in custody. Clearly the first test is also not satisfied and it cannot be said that it is a clear case where Mr. Vinay Jain could not be said to have entered into the agreements at all.

71. In view of the above the petitions are allowed with cost of Rs. one lakh on each of the Respondents. Respondent in Arbitration Petition No. 1147/2021 i.e. Mr. Vinay Jain shall deposit the costs of Rs. One lakh with the Delhi High Court Bar Association Pandemic Relief Fund and the Respondent in Arbitration Petition No. 1170/2021 i.e. M/s Best View Properties Limited shall deposit the costs of Rs. One lakh with the Delhi High Court Bar Association Employees Welfare Fund.

72. Accordingly, Mr. Justice Pradeep Nandrajog (retd), former Chief Justice of High Court of Judicature at Mumbai is appointed as the Arbitral Tribunal to adjudicate the claims and counter claims, if any. The arbitrator shall make the disclosure under Section 12 within two weeks of entering reference.

73. Petitions are allowed in the above terms.

SANJEEV SACHDEVA, J.

APRIL 05, 2022/rk